UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 15, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO Case No. 95A00097
AMERICAN TERRAZZO CORP., d/b/a JOHN DELALLO FOODS, Respondent.	)	

ERRATA

The following change shall be incorporated by reference into my Prehearing Conference Report of December 13, 1995:

Page 4, fourth full paragraph, which begins, "Respondent contends that even if proof of actual knowledge is lacking, constructive knowledge should be inferred, . . ." shall be changed to read "Complainant contends that even if proof of actual knowledge is lacking, constructive knowledge should be inferred, . . ."

ROBERT L. BARTON, JR.
Administrative Law Judge

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PREHEARING CONFERENCE REPORT

I. Introduction

A telephone prehearing conference (PHC) was held in this case at 10:00 a.m. Eastern Time on December 8, 1995. Complainant was represented by Kent Frederick, Esq. of the Immigration and Naturalization Service, 1600 Callowhill Street, Room 530, Philadelphia, PA 19130, and Respondent was represented by John Delallo, President, American Terrazzo Corp., d/b/a John Delallo Foods, 91 Fort Couch Road, Pittsburgh, PA 15241. During the conference I heard argument on Complainant's motion for partial summary decision (liability) and also discussed penalty and settlement. A court reporter was present in my office to record the PHC, and a transcript will be prepared and may be ordered by the parties. This report is prepared pursuant to 28 C.F.R. §68.13(c) and summarizes the matters discussed during the conference, but the transcript will serve as the official record of the conference.

II. Procedural History

The Complaint in this case was served on June 9, 1995. The complaint contains three counts. The first count alleges that Respondent knowingly hired and/or continued to employ an individual known as

Viktoria Gabor in violation of Section 274A(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a(a)(1)(A), which makes it unlawful, after November 6, 1986, to hire an individual knowing she is unauthorized to work. The second count of the complaint alleges that Respondent failed to prepare and make available for inspection the employment eligibility forms (I–9) for three named individuals, and the third count of the complaint alleges that Respondent hired twenty-two individuals for employment without properly completing Section 2 of the I–9 forms, in violation of Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B).

Respondent's answer to the complaint was received on June 30, 1995. In the answer Respondent admitted the allegation in paragraphs A–C of Count I, but denied the allegations in paragraphs D and E of Count I that it knew the illegal status of Ms. Gabor either at the time it hired her or during her continuing employment. Respondent denied the allegation in Count II that Section 1 of the I–9 had not been completed but did agree that Section 2 had not been completed. With respect to Count III Respondent admitted that by not recording the identifying numbers of the documentation it had failed to complete Section 2 of the I–9. With respect to the prayer for relief Respondent denied that the requested penalty was proper and specifically asserted that the proposed penalty was grossly unfair and excessive and would constitute a serious financial hardship.

Following receipt of the answer, on July 13, 1995 the First Prehearing Order was served, and a Joint Response to the First Prehearing Order by the parties was filed on August 9, 1995. In the Joint Response the parties stipulated that Respondent violated Section 274A(a)(1)(B) of the INA with respect to the three individuals listed in Count II and also with respect to the twenty-two individuals listed in Count III. Respondent did not stipulate to the violation alleged in Count I or agree to the penalty requested by Complainant in Counts I–III.

On November 7, 1995 I received Complainant's motion for summary decision which was supported by a memorandum of points and authorities. The motion requests decision on the issue of liability for all three counts of the complaint. With respect to the second and third counts, the motion is based on the fact that Respondent admitted liability for the violations set forth in those counts in its answer to the complaint and its stipulations set forth in the Joint Response. With respect to the first count, alleging the knowing violation, Complainant contends that, based on the Respondent's answers to

discovery requests, and the documentation attached to the motion, there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law. On November 20, 1995 I received Respondent's one page response to the motion. Thereafter, I scheduled a prehearing conference with the parties for December 8, 1995.

III. Issues

The issues raised by the motion for summary decision are as follows:

1. Whether Complainant is entitled to summary decision as to the issue of liability concerning the paperwork violations asserted in Counts II and III?

2. Whether Complainant is entitled to summary decision as to the issue of liability concerning the assertion that Respondent knowingly hired and continued to employ an alien not authorized for work in the United States as alleged in Count I?

3. Whether the requested penalty for each count of the complaint is reasonable and appropriate?

IV. Liability

A. *Counts II and III*

As previously noted, the answer to the complaint admitted the facts alleged in Counts II and III. However, the answer did not specifically admit liability. Moreover, in respect to Count II, Respondent asserted in its answer that it did complete Section I. However, in the Joint Response and its answer to the summary decision motion, Respondent acknowledged liability for both of these counts. Since Respondent did not sign the Joint Response, and in order to avoid any misunderstanding, I questioned Respondent during the PHC, and it expressly admitted that it committed the violations in Counts II and III.

Therefore, based on Respondent's answer to the complaint, the Joint Response, Respondent's answer to the summary decision motion, and, most importantly, the statements during the conference, I concluded that Respondent had admitted paragraphs A–E of Count

II of the complaint, had admitted paragraphs A–C of Count III of the complaint, and had admitted violating Section 274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B) which renders it unlawful to hire, after November 6, 1986, for employment in the United States an individual without complying with the requirements of Section 274A(b) of the INA. I therefore granted Respondent's motion for summary decision as to liability only with respect to Counts II and III.

B. *Count I*

Count I charges that Respondent knowingly hired and/or continued to employ in the United States an individual named Viktoria Gabor who was not authorized for employment in the United States. Respondent admitted in its answer and at the prehearing conference the assertions made in paragraphs A–C of Count I, that Respondent did hire Ms. Gabor after November 6, 1986 and that when she was hired, she was an alien not authorized for employment in the United States. However, Respondent denies the charges in paragraphs D and E, that it hired or continued to employ Ms. Gabor *knowing* that she was an unauthorized alien.

In the motion for summary decision Complainant contends that Respondent either had actual knowledge, or at least constructive knowledge, that Ms. Gabor was unauthorized because, although she claimed she was a United States citizen, she presented no documentation to establish that fact. Indeed she presented a social security card that stated in large type the words "Valid for work only with INS authorization." Complainant argues that it is preposterous to believe that a person claiming to be a United States citizen would present a social security card which requires the presentation of a INS work authorization document to be valid for purpose of employment eligibility, and, thus, if it did not have actual knowledge, it should have been on notice that something was wrong. Further, Complainant contends that Respondent should not have relied solely on the social security card. Complainant also notes that Respondent should be held to a higher standard than other employers because it had received an educational visit from the U.S. Department of Labor. *See* Complainant's Memorandum at 11.

Although Mr. Delallo stated during the conference that he did not recall any educational visit from the U.S. Department of Labor, Exhibit H to Complainant's memorandum shows that Respondent did receive an educational visit on February 7, 1992 from Mary

Lupean, wage and hour investigator. It also states that Respondent "was unaware of the I–9 and its requirements." The visit preceded Ms. Gabor's employment, which commenced on May 7, 1994. However, Exhibit H does not provide any details as to the nature of the visit, how long the visit lasted, or what was explained during the visit. Therefore, Exhibit H alone provides very little information as to the Respondent's understanding of the employment eligibility verification requirements.

Indeed, Mr. Delallo asserted that he acted in good faith and denied being aware that Ms. Gabor was an unauthorized alien. In fact, he stated during the conference that he never personally saw the social security card until after Ms. Gabor was terminated.

Complainant argues that summary decision is appropriate because the record establishes that there are no genuine issues of material fact and that Complainant is entitled to judgment as a matter of law. Complainant argues that it has shown Respondent had either actual knowledge or at least constructive knowledge of Ms. Gabor's unauthorized status. Complainant further argues that even if Respondent did not know that Ms. Gabor was unauthorized at the time of hire, it should have learned of such fact during her continued employment.

Respondent contends that even if proof of actual knowledge is lacking, constructive knowledge should be inferred, relying on the past cases of *United States v. Mester Mfg. Co.,* 1 OCAHO 53 (Ref. No. 18) (1988), *aff'd,* 879 F.2d 561 (9th Cir. 1990) and *United States v. New El Rey Sausage Company, Inc.,* 1 OCAHO 389 (Ref. No. 66) (1989), *modified* 1 OCAHO 542 (Ref. No. 78) (1989), *aff'd* 925 F.2d 1153 (1991).

As Complainant recognizes, the party seeking summary decision has the burden of showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. If it fails to do so, the motion should be denied.

I denied Complainant's motion for summary decision based either on a theory of actual knowledge or constructive knowledge for several independent reasons. First, with respect to actual knowledge the record evidence at this time is insufficient to establish that Respondent had actual knowledge that Ms. Gabor was an unauthorized alien either at the time of hire or during her continued employ-

ment. Complainant's case with respect to actual knowledge is based on inference and circumstantial evidence which simply is too weak to sustain on a motion for summary decision where all reasonable inference must be accorded the non-moving party.

Moreover, with respect to the contentions as to both actual and constructive knowledge, summary decision generally is inapposite when there are issues concerning the state of mind of a party. Federal case law provides that because determining someone's state of mind usually requires the drawing of factual inferences, summary judgment is generally an inappropriate method of resolving an issue of this type. *See Braxton-Secret v. A.H. Robins Company*, 769 F.2d 528 (9th Cir. 1985); *Martinkovic v. Wyeth Laboratories, Inc.,* 669 F. Supp 212 (N.D. Ill. 1987); and *Ivins v. Celotex Corp.,* 115 FRD 159 (E.D. Pa. 1986) (summary judgment was precluded where there was an issue of material fact as to whether the manufacturer knew or should have known of facts which would have caused a reasonable person to realize that there was a significant health risk caused by exposure to asbestos). While my ruling should not be read to mean that a motion for summary decision is never appropriate when state of mind is an issue, in this case the record is insufficient to establish that Respondent either had actual or constructive knowledge of Gabor's unauthorized status. A genuine issue of material fact remains as to the Respondent's knowledge of Ms. Gabor's status at the time of hire and afterward, and there is insufficient evidence at this time to apply a theory of constructive knowledge.

Aside from the difficulty of deciding this issue in a summary manner, there are other problems which led me to deny the motion with respect to the issue of constructive knowledge. The theory of constructive knowledge with respect to Section 1324a was first developed in *Mester, supra,* and only has been adopted by one federal circuit to *date.* Moreover, the application of the theory of constructive knowledge has been very limited, and under circumstances quite different from the instant case. As I noted at the conference, constructive knowledge has been found in certain cases where the employer continued to employ individuals after the INS had notified the employer of the employees' questionable status. *See Mester, supra* and *New El Rey Sausage, supra*. For example, in *Mester,* the Circuit Court deferred to the ALJ's finding of constructive knowledge because the INS specifically had notified the employer about three employees whom the INS suspected of using false alien registration cards, and the employer continued to employ them without taking

appropriate action to verify their status. *See Mester*, 879 F.2d at 564, 566–67. Thus, *Mester* and *New El Rey Sausage*, as well as the later decision of the Ninth Circuit Court of Appeals in *Noel Plastering v. OCAHO*, 15 F.3d 1088 (1993), have found constructive knowledge when the employer has been given a warning by the INS and has continued to employ the suspect aliens. The Court in *Noel Plastering* found that the employer had received written notice from the INS that the employees were likely unlawfully employed aliens which was sufficient to give an employer constructive knowledge of a violation.

However, the Circuit Court has given clear warning that the doctrine of constructive knowledge must be sparingly applied. This was made abundantly clear by the Court in *Collins Foods International v. INS,* 948 F.2d 549 (1991) where the Court reversed a finding of constructive knowledge by the ALJ and CAHO in an initial hire situation where no INS warning existed. In *Collins,* the INS relied on a social security card which it contended the employer should have known was not valid. The ALJ agreed, holding that Respondent should have known the employee was not authorized for work in the United States, and the CAHO affirmed. 1 OCAHO 828, 838 (Ref. No. 123) (1990), *aff'd,* 1 OCAHO 875 (Ref. No. 129) (1990).

The Ninth Circuit Court of Appeals, in a unanimous opinion, disagreed. The Court reviewed the legislative history of the legislation in some detail and concluded that the ALJ's holding placed on employers a verification obligation greater than that intended by Congress and beyond that outlined in the narrowly drawn statute. 948 F.2d at 554. The Court then concluded that the doctrine of constructive knowledge has great potential to upset the carefully crafted balance between the goal of preventing unauthorized alien employment and discrimination against citizens and authorized aliens.

While the Ninth Circuit's decisions are not binding in this case since it arises in Pennsylvania which is within the jurisdiction of the Third Circuit Court of Appeals, its decisions are the only federal circuit precedent on this issue and are quite persuasive. Given the state of the record, and the existing case law, I concluded at the conference that, in view of the *Collins* decision, it would be inappropriate to grant summary decision to an initial hire situation where no INS warning was given to Respondent. Therefore, since there are disputed issues of material fact as to Respondent's knowledge and

state of mind during the period of Ms. Gabor's employment, I denied Respondent's motion for summary decision as to paragraphs D and E of Count I of the complaint.[1]

V. Remaining Issues

The issue of liability with respect to Count I remains, as well as the question of penalty with respect to all three counts.

With respect to Count I, Complainant is seeking a penalty of $1,200 for the one violation. With respect to Count II, Complainant is seeking a penalty of $550 per violation for each of the three named individuals for a total of $1,650. With respect to Count III, Complainant is seeking a penalty of $550 per violation for each of the twenty-two named individuals for a total of $12,100. The total penalty Complainant seeks is $14,950.

Applying the statutory criteria set forth in 8 U.S.C. §1324a(e)(5) to the paperwork violations charged in Counts II and III, Complainant contends that the 25 violations are serious and that Respondent was not acting in good faith. Complainant does not assert that Respondent has a history of prior violations, that the individuals listed in Counts II and III are unauthorized or that Respondent is anything other than a small business.

Respondent contends it acted in good faith, that it is a very small business (with less than thirty employees), and that the violations are not serious.

The question of whether the parties still want an evidentiary hearing on the remaining issues was discussed. Complainant indicated that it presently believes it will rely on documentary evidence both to prove liability for Count I as well as to support the penalty request for all three counts. Respondent indicated it may wish to

[1] There is only one decision which has applied the theory of constructive knowledge to an initial hire situation where no INS warning had been given to the employer. *United States v. Sophie Valdez, d/b/a La Parilla Restaurant,* 1 OCAHO 598, 608–10 (Ref. No. 91) (1989), *reconsideration denied,* 1 OCAHO 685 (Ref. No. 104) (1989), *denial of reconsideration aff'd,* 1 OCAHO 744 (Ref. No. 112) (1989). However *Sophie Valdez* was not cited or relied on by Complainant and in light of *Collins* its continued validity may be questionable. In any event *Sophie Valdez* was not decided on a summary decision motion. After this case is submitted on the merits, I will invite the parties to address the appropriate case law, including *Collins* and *Sophie Valdez.*

present evidence with respect to the disastrous affect that the requested penalty of $14,950 would have on its business.

I explained during the conference that while the Complainant has the burden of proof both with respect to liability and penalty, either party has the right to offer evidence on these issues. However, documentary evidence may be offered without an evidentiary hearing. An evidentiary hearing only is necessary if one or more parties wish to offer testimony. Since neither party indicated at the conference that it would be calling any witnesses, I ruled at the conference that if either party wished an evidentiary hearing on the remaining issues of liability and/or penalty, it must notify the Judge and the opposing party in writing not later than Friday, December 15, 1995 that it intends to call witnesses. If I do not hear from either party by that date that they want an oral evidentiary hearing, I will conclude that the parties are waiving a hearing and wish to submit their positions with respect to the remaining issues by brief. I will then issue a further order setting a briefing schedule.

Finally, possible settlement was discussed at the conference. Although the parties indicated their willingness to consider settlement, they were so far apart in their offers that I concluded settlement is not likely at this time. However, if the parties do reach settlement, I will expect Complainant promptly to notify the Court of that fact.

VI. Conclusion

Any rulings made at the prehearing conference which are not reflected in this Report, unless specifically contravened by this Report, remain effective even though they are not mentioned in the Report. The transcript will serve as a record of those rulings. If either party objects to any part of this Report on the ground that it does not accurately reflect the ruling at the Conference, such objections shall be filed and served within ten days of the service date of this Report. Such objections should not be merely requests for reconsideration. Rather they should be filed only if this Report does not accurately reflect the ruling.

ROBERT L. BARTON, JR.
Administrative Law Judge